Supreme Court, U.S.
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In The
Supreme Court of the United States

BARON SPENCER GOLDSBERRY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Virginia must extend the constitutional protections of due process and equal protection in the review of a criminal petition for appeal even in a case where the state grants no automatic right to have a petition for appeal accepted?

II. Whether Virginia denied Goldsberry due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution in its review of a petition for appeal when the state misstated a constitutional burden of proof; misstated material trial testimony; erroneously applied its law; and disregarded applicable law as evidenced in its opinion by the Court of Appeals of Virginia denying the petition for appeal and where the opinion in error was not corrected by the Virginia Supreme Court in its cursory orders denying the petition for appeal?

A. Whether a Constitutional burden of proof was erroneously stated and tacitly adopted by the Virginia Supreme Court?

B. Whether Material trial testimony was misstated and tacitly adopted by the Virginia Supreme Court?

C. Whether Virginia law was misapplied by the Virginia appellate courts?

D. Whether relevant law was disregarded by the Virginia appellate courts?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Baron Spencer Goldsberry respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinions of the Supreme Court of Virginia and the Court of Appeals of Virginia are unpublished. The Court of Appeals of Virginia denied Goldsberry's Petition for Appeal by an opinion entered on January 23, 2003. On April 11, 2003, the Court of Appeals, by a three judge panel, denied the Petition for Appeal. The Supreme Court of Virginia issued its order denying Goldsberry's Petition for Appeal on November 17, 2003. On January 30, 2004, the Supreme Court of Virginia denied Goldsberry's Petition for Rehearing. (See Appendix pp. 1a through 9a).

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(a). Goldsberry claims his rights to Due Process and Equal Protection under the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The constitutional provision involved in this petition is section one of Amendment XIV to the Constitution of the United States. (U.S. Const. Amend. XIV.)

> **Section 1. Citizenship Rights Not to Be Abridged by States.** - - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

> reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The deceased, Timothy Ballard (Ballard), was killed on July 8, 2000 after initiating a fight at Greenie's Coach Lamp Inn, a nightclub in the city of Norfolk, Virginia. Ballard, a large man at 215 pounds (outweighing Goldsberry by approximately 50 pounds) had been drinking throughout the evening of July 8, 2000. His blood drawn at the time of autopsy (July 10, 2000) produced a blood-alcohol content (BAC) of .15 percent by weight, by volume. (Tr. II, pp. 221, 226). The Commonwealth's medical expert testified that at .15 people are easily excited and can have aggressive behavior. (Tr. II, p. 228-229).

Prior to initiating a physical fight, the deceased disrupted a billiards game between Goldsberry, his friend, Villalpando, a certain gentleman and his girlfriend inside the club. The deceased had no part in the game and, Gregory Williams (Williams), a friend of Ballard, who was also present, admitted that the pool game was none of his nor Ballard's business. (Tr. I, p. 78). The deceased belligerently confronted Goldsberry over a pool shot Ballard deemed to be a "bullshit shot" or as Williams said, a "foul shot." (Tr. II, p. 270; see Appendix p. 27a). Although Williams at first was misleading with regard to Ballard's temperament, he had to admit that when it seemed to be "out of control," he tried to persuade Ballard to leave. (Tr. I, p. 79). Williams admitted further that the deceased "walked up to" Goldsberry, used curse words, and was still arguing

when the entire group was asked to leave by the club's owner. (Tr. I, pp. 77-79). The deceased and Williams were ordered to go out one door, Goldsberry and Villalpando, the other. Although Ballard and Williams left before Goldsberry and Villalpando, the deceased was waiting at Goldsberry's point of exit, at the rear patio deck. (Tr. I, p. 69, 82, 84, 85; Tr. II, p. 297).

Even though Ballard and Williams left together, Williams testified that the deceased got some 15 to 20 feet ahead of him. (Tr. I, pp. 68-69). When asked if he had lost sight of the deceased on the way out, Williams stated, "yeah, for a little bit because there was [sic] more people in front of me." (Tr. I, p. 69). Later when asked to explain how Ballard had gotten so far ahead of him when exiting, Williams stated, "I hesitated for a minute." When asked, "doing what?" he replied, ". . . maybe I was tying my shoe or something, I don't know how he got ahead of me." (Tr. I, p. 83).

When Williams caught up with the deceased, he missed seeing what happened immediately outside, but his first observation was that Ballard was "real close, right up next to [Goldsberry and Villalpando]" near the rear patio deck. (Tr. I, p. 70; see Appendix p.15a). Upon seeing Ballard at Goldsberry's point of exit, Williams admitted that he knew there was going to be a fight. (Tr. I, p. 85). According to Williams, his friend Ballard (Tim) "pushed and swung, and then he was on the ground." (Tr. I, p. 70; see Appendix p.15a).

After assaulting both the petitioner, Baron Goldsberry (Goldsberry) and his friend, Frank Villalpando (Villalpando), outside of the club, the deceased was immediately taken down and was severely beaten by Villalpando with fists and feet, causing bruising, lacerations, hemorrhaging and fracturing to the face and head areas

with an apparent blow to the top of the head which caused a contusion of the brain stem resulting in death. (Tr. II, pp. 211-212).

Goldsberry, however, was removed from the fight by Williams within seconds of Ballard landing on the ground. (Tr. I, p. 72, 89; Tr. II, 129, 130, 138).

Williams was on the "edge of the deck," when he saw "Tim" (Ballard) push and swing and *lose his balance*. (Tr. I, p. 70; see Appendix p. 15a). Williams estimated he was within *10 to 15 feet* of Ballard, Goldsberry and Villalpando at the edge of the deck. (Tr. I, p. 71) (emphasis added). He also testified that from the time Ballard lost his balance and was being kicked only *"a few seconds"* had passed before he came down off the deck towards them. (Tr. I, p. 89; see Appendix p. 18a) (emphasis added). Williams immediately came towards them and Goldsberry came at him. Goldsberry was removed from the fight (leaving Villalpando and Ballard alone) some "10 to 12 feet" into the "car area." (Tr. I, pp. 72, 89; Tr. II, pp. 129, 130, 138; see Appendix pp. 17a, 18a, 21a, 22a, 24a). After his verbal altercation with Goldsberry, Williams saw both men take off running down the beach. (Tr. I, pp. 72-73).

Another State witness, Michael Corletto, confirmed that Goldsberry had gotten "away from the main fight" and was backing into the "car area," with Williams some "10 to12 feet" from where Villalpando was beating Ballard. (Tr. II, pp. 129, 130, 138; see Appendix pp. 21a, 22a, 24a). Although Goldsberry had been diverted away from Ballard within "a few seconds," (Tr. I, p. 89), Villalpando was involved with Ballard until it was broken up by Corletto in less than 30 seconds. (see Appendix 25a).

Corletto saw kicking and punching and stomping, noting "it happened so quick [sic]." (Tr. II, p. 127). Finally,

Corletto testified that from the time he first heard scuffle until he arrived to pull Villalpando from Ballard, "less than 30 seconds" had elapsed. (Tr. II, p. 144). Blows were being delivered by Villalpando as Corletto "was running to the scene." (Tr. II, p. 128). He also indicated that "one guy was definitely more aggressive than the other." (Tr. II, p. 127). When he arrived, only one man (Villalpando) was on the deceased. (Tr. II, p. 129; see Appendix p. 21a).

Although the jury may have confused who was who, the record makes it objectively clear that it was your Petitioner who had been diverted from the deceased within seconds.

Gregory Wendel (Wendel) was also a patron at the club that night. Ballard's belligerent confrontation of Goldsberry in the billiard area was loud enough to get the attention of Wendel, some 20 to 25 feet away. (Tr. I, p. 100). Although the confrontation lasted several minutes, Wendel could not elaborate on the details because he "really wasn't paying attention to it." (Tr. I, p. 102).

Sometime later Wendel went out on the back deck to smoke a cigarette. (Tr. I, p. 102). He noticed "people rolling around on the ground" . . . and he "saw people fighting." (Tr. I, pp. 104). The kicking and punching only lasted "a few seconds, [a] few minutes maybe . . ." (Tr. I, p. 106).

The State's final fact witness, Tara Holste (Holste), was also socializing at Greenie's, having arrived about one o'clock in the morning on July 9, 2000. Holste heard scuffling noises and loud voices. During this time she only looked over "like, for a second," and "then [she] didn't pay attention," but noted that she did look back. (Tr. II, p. 151).

She went on to say that one individual was crouched over Ballard, "like a wrestling match or something." (Tr. II,

p. 151). She indicated that the second person was kicking him in the head. She estimated that one man kicked Ballard eight times and the other person only kicked once. (Tr. II, p. 152). Holste stated, "it didn't look like" Ballard moved or fought back after he hit the ground, but she noted that her view was blocked so she could only see "part of [Ballard's] body." (Tr. II, pp. 152-153).

With respect to how Ballard ended up on the ground, the State's evidence was conflicting: Williams believed he "lost his balance." (Tr. I, p. 70); Corletto said he was tackled: one guy grabbed Ballard "down low" and the other had him "up on top." (Tr. II, p. 127); Holste said one guy punched Ballard and he fell down. (Tr. II, pp. 162-163); and Wendel did not see him go down.

Goldsberry testified that he was playing a doubles game of pool with his friend Frank Villalpando, a certain gentleman and his girlfriend. Out of nowhere, he was confronted by a stranger who approached him saying that his shot was a "bullshit shot." (Tr. II, pp. 269-270). Goldsberry tried to explain the shot, but "he continue[d] to say it was a bullshit shot, and it evolved into other curse words and confrontation back and forth." (Tr. II, p. 270). The more Goldsberry tried to explain, the angrier and louder the deceased became, cursing and putting Goldsberry down. (Tr. II, p. 270). The deceased also made insulting remarks towards the young lady whom he assumed was with Goldsberry, calling her a "slut and a whore." (Tr. II, p. 271).

Goldsberry tried to ignore him and told the deceased to leave them alone. (Tr. II, p. 293). The disruption continued, however, to the point where the bouncer asked the entire group to leave. (Tr. II, p. 297). The deceased and Williams were ordered to go out one door, Goldsberry and Villalpando, the other. (Tr. II, p. 297).

The deceased, however, was waiting for Goldsberry at the patio/parking lot area when Goldsberry came out of the club. (Tr. II, pp. 297-298). Goldsberry testified that he was fearful of Ballard because of his aggressiveness and large size. (Tr. II, pp. 277-278). The deceased came straight at Goldsberry, with fighting words and assaulted him by lunging forward with his hands. (Tr. II, pp. 274, 299, 300; see Appendix p. 28a). Goldsberry blocked Ballard's hands and Villalpando stepped in. (Tr. II, p. 300). The deceased then pushed Villalpando and swung at him. (Tr. II, p. 300). The deceased was immediately taken down. (Tr. II, p. 301). Goldsberry testified, consistently with the evidence, that he only delivered two respective kicks and punches and he affirmed that he immediately became occupied with Williams which removed him from Ballard and Villalpando. (Tr. II, p. 278;). Goldsberry also testified that he certainly never intended for Ballard to die. Goldsberry possessed no weapons of any kind. (Tr. II, pp. 281, 311).

Procedural History

On October 30, 2001, Baron Spencer Goldsberry appeared in the Circuit Court of the City of Norfolk on a single charge of second degree murder. Goldsberry was tried by jury and was found guilty of second degree murder on October 31, 2002. On May 7, 2002, the trial court denied Goldsberry's motion to set aside the verdict. On May 24, 2002, Goldsberry was sentenced to twenty years in the Virginia State Penitentiary.

Goldsberry then petitioned the Court of Appeals of Virginia. On January 23, 2003, the Court of Appeals of Virginia denied said petition. (Appendix pp. 4a-9a). On April 11, 2003, a three-judge panel of said court denied the petition for "reasons previously stated." (Id. at 3a).

The Supreme Court of Virginia denied Goldsberry's Petition on November 17, 2003, without addressing or correcting the errors of the January 23, 2003 opinion. (Id. at 2a). On January 30, 2004, the Supreme Court of Virginia denied the petition for rehearing without comment. (Id. at 1a).

Finding material errors and a denial of due process of and equal protection of law in the review of Goldsberry's Petition for Appeal in both the Court of Appeals of Virginia and the Supreme Court of Virginia, your petitioner therefore applies for relief in this Honorable Court and hereby submits his writ which was timely filed and is properly before this Court.

REASONS FOR GRANTING THE WRIT

This case affords this Honorable Court the opportunity to rule on the novel issue of whether a State must extend the safeguards of the United States Constitution when it reviews a criminal Petition for Appeal, even when the State grants no automatic right of appeal.

This case also provides the Supreme Court an opportunity to correct material and constitutional errors committed by the Court of Appeals of Virginia which were tacitly adopted by the silence of the Supreme Court of Virginia. (Goldsberry petitioned the Virginia Supreme Court to address said errors. See Appendix pp. 13a-14a).

And finally, by correcting the errors, this case provides this Honorable Court the opportunities to restore confidence in Virginia's judicial system and to achieve the interests of justice when the appeal is reviewed with application of the correct burden of proof, trial testimony and law. Correcting the errors will allow the merits of the appeal to emerge. The United States Supreme Court is the only Court possessing the authority to order the Virginia

appellate courts to review Goldsberry's Petition for Appeal in a manner consistent with due process and equal protection; which is to say: accurate analysis of fact and application of law.

I. VIRGINIA MUST EXTEND THE CONSTITUTIONAL PROTECTIONS OF DUE PROCESS AND EQUAL PROTECTION OF LAW IN THE REVIEW OF A CRIMINAL PETITION FOR APPEAL EVEN IN A CASE WHERE THE STATE GRANTS NO AUTOMATIC RIGHT TO HAVE A PETITION FOR APPEAL ACCEPTED.

Appeals from criminal convictions in Virginia are discretionary, except for cases in which the death penalty has been imposed under Virginia Code § 17.1-406.

This Honorable Court has held that the right to appellate review is not a necessary element of due process under the United States constitution. Griffin v. Illinois, 351 U.S. 12, 18 (1956); McKane v. Durston, 153 U.S. 684, 687 (1894).

Nevertheless, once appellate avenues are established, "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Saunders v. Reynolds, 214 Va. 697 (1974) citing Griffin v. Illinois, 351 U.S. 12 (1956). A State does not encounter constitutional problems by foreclosing appellate avenues. But when a State allows petitions to be presented, it must review the petitions in a manner consistent with principles of due process and fundamental fairness. At a minimum, a State's review of a criminal Petition for Appeal must preserve confidence and integrity in the judicial system.

To uphold this confidence, Virginia employs the merits-based test in deciding which petitions to grant. "We state unequivocally that a decision to grant or refuse a petition for writ of error is based upon one equally-applied criterion – the merits of the case." Saunders at 700.

As a result of an increased case-load with a substantial number of frivolous petitions to sort through, certainly some merit-based petitions elude the appellate courts of Virginia. Accordingly, some jurists had concluded decades ago that the Virginia Supreme "[C]ourt now refuses to review cases in which it once would have considered that substantial possibility of error existed." Saunders at 700, citing Graham C. Lilly and Antonin Scalia, Appellate Justice: A Crisis in Virginia? 57 Va. L. Rev. 3 (1971). Such was the case with Goldsberry.

As the objective facts and relevant law of this appeal are merged in the following pages, it will become apparent that the Virginia Judicial system failed to properly apply a merit-based review of Goldsberry's petition, thus violating the Due Process and Equal Protection Clauses of the United States Constitution.

II. VIRGINIA DENIED YOUR PETITIONER DUE PROCESS AND EQUAL PROTECTION OF LAW IN ITS REVIEW OF A PETITION FOR APPEAL WHEN THE STATE MISTATED A CONSTITUTIONAL BURDEN OF PROOF; MISSTATED MATERIAL TRIAL TESTIMONY; ERRONEOUSLY APPLIED ITS LAW; AND DISREGARDED APPLICABLE LAW AS EVIDENCED IN ITS OPINION BY THE COURT OF APPEALS OF VIRGINIA DENYING THE PETITION FOR APPEAL AND WHERE THE OPINION IN ERROR WAS NOT CORRECTED AND THUS TACITLY ADOPTED BY THE VIRGINIA SUPREME COURT IN ITS CURSORY ORDERS DENYING THE PETITION FOR APPEAL.

A. Constitutional burden of proof erroneously stated and tacitly adopted by the Virginia Supreme Court.

In denying Goldsberry's Petition for Appeal, the Court of Appeals of Virginia misstated Goldsberry's position and a constitutional burden of proof in a murder conviction. On page one of its Order of January 23, 2003, the Court states: **"Appellant argues the evidence proved he acted in the heat of passion rather than with malice."** (See Appendix p. 4a) In its Order of April 11, 2003, the panel simply denied the Petition for the "reasons previously stated in the order entered by this Court on January 23, 2003 . . . ." (See Appendix p. 3a).

Although Goldsberry petitioned the Virginia Supreme Court to address said constitutional error (see Appendix pp. 13a-14a), on November 17, 2003, the Virginia Supreme Court denied his petition without correcting or addressing the error contained in the opinion of January 23, 2003. (See Appendix p. 2a). On January 30, 2004, the

Virginia Supreme Court again denied Goldsberry's Petition for Rehearing without comment. (See Appendix p. 1a).

Goldsberry certainly did not and does not argue, as the Virginia Courts would lead one to believe, that the evidence "proved he acted in the heat of passion rather than with malice." Goldsberry, of course, does not bear the heavy burden to "prove" he acted in the heat of passion. See Mullaney v. Wilbur, 421 U.S. 684, 704 (1975). The burden to prove malice and to prove the absence of passion beyond a reasonable doubt rests squarely with the Commonwealth and, as a "procedural device," the defendant is only required to offer some evidence or rely on the Commonwealth's evidence to negate the presumption of murder. Hodge v. Commonwealth, 217 Va. 338, 343 (1976).

Burden is On the Commonwealth
to Prove Absence of Passion.

In 1975, this Honorable Court affirmed reversal and invalidated a Maine law which required a defendant to establish by a preponderance of the evidence that he acted in the heat of passion to reduce murder to manslaughter. Mullaney v. Wilbur, 421 U.S. 684 (1975). The Court held that "the Due Process Clause requires *the prosecution* to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." Mullaney at 704 (emphasis added). If that burden of proof is placed on the defense, a defendant can be given a severe sentence "when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence." The Court in Mullaney continued by stating, "this is an intolerable result in society where, to paraphrase Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." Mullaney at 703, 704.

Shortly thereafter, the Supreme Court of Virginia applied Virginia law in light of Mullaney, in the case of Hodge v. Commonwealth, 217 Va. 338 (1976). The Commonwealth is required to "negate passion beyond a reasonable doubt" once the defendant produces "some credible evidence" of passion. Id. at 343. (And even if he produces no evidence, "he may rely upon the Commonwealth's evidence to secure . . . an acquittal on the charge of murder, if that evidence indicates he acted in the heat of passion." (Id.)

In placing this burden of negating passion squarely on the State, the Mullaney Court was keenly aware of the potential difficulty for the State: "No doubt this is often a heavy burden for the prosecution to satisfy." However, "[t]his is the traditional burden which our system of criminal justice deems essential." Mullaney at 701.

When an erroneous burden of proof is stated in an order by a State appellate court, without correction of the error, one cannot avoid the inescapable lack of confidence in the appellate analysis and of the reasonable conclusion that the analysis was in error. The old maxim, "if one begins with a faulty premise, he will reach a faulty conclusion," must apply. Goldsberry and all who look into Virginia's rejection of his Petition for Appeal are left with little or no assurance in the integrity of the judicial system of the Commonwealth of Virginia.

The State Failed to Prove Absence of Passion

In the present case, credible evidence was produced by the Commonwealth and the defense to indicate acts done out of heat of passion and not out of malice. Without any evidence by the Commonwealth to negate passion, the jury was left with evidence showing that it was as likely as not that Goldsberry acted out of heat of passion than out of malice.

Goldsberry's testimony that Ballard assaulted him reasonably flows from the evidence and does not contradict the testimony of the Commonwealth. Inside the establishment the deceased aggressively confronted Goldsberry with abusive and insulting language. After being asked to leave, the deceased was waiting for him outside of the club and came straight at him with fighting words and assaulted him by lunging forward with his hands. (Tr. II, p. 298). Goldsberry blocked his hands and Villalpando stepped in. (Tr. II, pp. 274-75). The deceased then assaulted Villalpando. Goldsberry testified that he was afraid of the deceased because of "his aggressiveness and size." (Tr. II, p. 278).

Certainly, indications of passion were present and the Commonwealth failed to offer any testimony to negate this evidence. Specifically, the Commonwealth offered no evidence to show that the deceased did not assault Goldsberry. Not one Commonwealth witness could say he or she saw the initial happenings between the deceased and Goldsberry outside of the club. The first observation by Williams, who admittedly lost sight of the deceased, was Ballard "right up close" to Goldsberry and Villalpando, with the deceased pushing and swinging at Villalpando. (Tr. I, p. 70).

B. Material trial testimony misstated and tacitly adopted by the Virginia Supreme Court.

Among the errors contained in the January 23, 2003, order of the Court of Appeals (which were not corrected by the Virginia Supreme Court), the court misstated the testimony of a material witness in page two of said order: **"Williams testified appellant repeatedly kicked Ballard while Ballard was on the ground."** (See Appendix p. 5a). The court also incorrectly stated: **"Other witnesses testified they saw two men kicking and punching Ballard in the head and chest area . . . ."** (See Appendix p. 5a). As the record bears witness, however, Williams did not testify Goldsberry "repeatedly kicked" Ballard and no Commonwealth witness could say that Goldsberry delivered more than two respective kicks and/or punches.

Because of the misstated testimony, the court consequently intimated in pages two and three of said order, that Goldsberry gave **"self-serving testimony"** with respect to his testimony that "he only kicked Ballard twice and did not intend to kill him." (See Appendix p. 5a). The record, again, does not support the language of the court's order; neither does it conflict with Goldsberry's testimony that he only delivered two kicks.

The transcript from the trial reveals that Williams did not testify *Goldsberry repeatedly kicked the deceased* and Goldsberry was not identified in any way whatsoever as kicking Ballard in his head. When the prosecutor asked him how many kicks he saw, Williams' answer was ambiguous and in doubt: ***"I don't know,* just a few . . . *there were people in front of me and stuff. Just a few kicks,* I mean, approximately, *maybe* four or five a piece *or something to that effect."*** (Tr. I, p. 72; see Appendix p. 17a) (emphasis added).

The only certainty contained in that testimony is that he really did not know because his view was blocked. Williams begins his answer with the fact that he "didn't know" and gives the reason why (people were in front of him), and from there his answer is pure guess work. The court was in error to summarize this uncertain testimony in the manner that it did. The court simply adopted an inaccurate conclusion from the prosecutor's Brief in Opposition. On page two of its brief, among other things unreasonably stated, the prosecutor asserted, "Williams saw the defendant and Villalpando repeatedly kicking the victim in his upper body and head." At trial, however, the answer to the prosecutor's compound question reveals little: "You saw both defendants kicking him. Could you tell where? What portions of his body?" (Tr. I, p. 71). Without clarifying which kicks Goldsberry delivered and where they landed, without testifying to the level of force Goldsberry used, and without providing the number of kicks delivered respectively, Williams responded: "his head and upper body." Id. See Appendix p. 16a.

The Commonwealth further asserted, on pages six and seven of said brief that, "the defendant and his co-actor both engaged in a relentless and brutal physical attack upon [the deceased]."

Of course, the record shows that Williams was on the patio deck within 10-15 feet of the fight and he testified that from the time Ballard fell to the ground and was being kicked only *"a few seconds"* had passed before he came down off the deck to assist his friend. (Tr. I, p. 89) (emphasis added). Corletto confirmed that Goldsberry had gotten "away from the main fight" and was backing into the "car area" with Williams some "10 to12 feet" from where Villalpando was beating Ballard. (Tr. II, pp. 129, 130, 138). Villalpando was involved with Ballard until it was broken up after approximately 30 seconds. Goldsberry, on the

other hand, was diverted away from Ballard within "a few seconds." (Tr. I, p. 89).

Williams did not testify that Goldsberry "repeatedly kicked Ballard" and neither did any other Commonwealth witness:

When the prosecutor asked Gregory Wendel how many kicks he saw, he answered: "I saw two." (Tr. II, p. 105; see Appendix p. 19a). Defense counsel asked Wendel, "[f]rom the bit that you were able to see, would you say this thing lasted a couple of seconds?" Wendel replied: "More or less from what I saw." (Tr. I, p. 117).

Michael Corletto saw "kicking and punching, stomping." And he noted, "[i]t happened so quick [sic]." When asked how many kicks he saw, he testified, "I couldn't tell you the total amount of kicks. One guy was definitely more aggressive than the other." (Tr. II, p.127; see Appendix p. 20a). Corletto affirmed that one of the men (Goldsberry) approached Williams while the other continued his "beating" of Ballard. (Tr. II., p. 135). He also affirmed that the man (Villalpando) he "grabbed" and pulled off of Ballard was the "primary" or "main aggressor." (Id.). Finally Corletto affirmed that from the time he heard the scuffle until the time he arrived at Ballard's side, "less than 30 seconds" had elapsed. (Tr. II, pp. 138, 144).

Tara Holste testified that she saw "at least eight" kicks from one of the men, but she only saw "one" kick from the other man. (Tr. II, p. 152; see Appendix p.26a).

Consequently, Goldsberry's testimony that he kicked Ballard twice is supported by the Commonwealth's evidence and is not in conflict with the total evidence.

Additionally, the testimony that Ballard assaulted Goldsberry when he exited the club is reasonable and naturally flows from the evidence.

The testimony that Goldsberry was fearful of the deceased is also a reasonable hypothesis and may not be arbitrarily discarded by the trier of fact. Corbett at 307. On the night in question, Ballard was intoxicated, angry and things had gotten "out of control." (Tr. I, p. 79). Ballard was a larger man who was bent on trouble and had made his fighting intentions clear. Prior to seeing any physical altercation, Ballard's friend admitted he "knew there was going to be a fight . . ." (Tr. I, p. 85). With an existing fear of the deceased, it cannot be said that the unprovoked assault upon himself and Villalpando did not produce a sudden "transport of passion" or "hot blood."

The assertion that it was as likely as not that Goldsberry acted out of passion upon provocation is reasonable and is completely in accord with the evidence. This hypothesis reasonably flows from the evidence, and does not merely "spring from the imagination of the defendant." Hamilton v. Commonwealth, 16 Va. App. 751, 755 (1993).

It is also reasonable that Goldsberry was not aware of the level of injury inflicted upon the deceased because he was removed from Ballard within seconds and Villalpando continued his beating of the deceased. (Tr. I, p. 87, 89; Tr. II, pp. 138,144).

The testimony that Goldsberry never intended to kill Ballard is reasonable considering that fact that Goldsberry was not the first aggressor and he possessed no firearm, knife nor weapon of any type. The evidence established that only fists and feet were used and the State's evidence did not establish that Goldsberry delivered more than two kicks.

Goldsberry was wearing "tennis shoes" on the relevant evening, which certainly would not be the type of gear one would expect to cause death by two kicks. (Tr. II, p. 278).

It cannot be argued tenably that the facts of the present case are "inconsistent" with passion, and thus the Commonwealth has not met its burden. Rather, the facts are consistent with passion and the Commonwealth failed to present evidence to exclude the reasonable hypothesis of passion and hence, manslaughter.

> [W]here a fact is equally susceptible of two interpretations, one of which is consistent with the innocence of the accused, [the trier of fact cannot] arbitrarily adopt the interpretation which incriminates him. Corbett v. Commonwealth, 210 Va. 304, 307 (1969).

Goldsberry's testimony was not in conflict whatsoever with the Commonwealth's evidence, on any point. On the contrary, his testimony, including the testimony that the deceased assaulted Goldsberry at his point of exit is in complete accord with the Commonwealth's evidence. The evidence presented also does not allow for the conclusion that Goldsberry gave *self-serving* testimony. Gregory Williams testified that Ballard initiated a confrontation with Goldsberry inside of the club. The deceased was intoxicated and the Commonwealth's medical expert affirmed that people with a BAC of .15 can be aggressive. (Tr. II, p. 229).

To disregard Goldsberry's testimony that Ballard assaulted him and he delivered two kicks, without any conflict in testimony and with facts which reasonably support the testimony is to "arbitrarily adopt" the version of the Commonwealth.

But, unfortunately, this is precisely what the State appellate courts did on every material point of testimony.

C. Virginia law misapplied by the Virginia appellate courts.

The misstating of material trial testimony and a constitutional burden of proof caused the Virginia appellate courts to misapply Virginia law.

On page three of the mentioned order of January 23, the court cited Williams v. Commonwealth, 13 Va. App. 393, 395 (1991), to support its denial of Goldsberry's Petition for Appeal and to uphold his murder conviction.

Specifically, Williams was cited to show that malice and an intent to kill or maim may be found even where only fists and feet are used.

A comprehensive examination of Virginia case law, however, reveals that there has never been a conviction for murder based upon a set of facts as Goldsberry's case presents. While it is true that Virginia law allows for circumstances where the use of fists and feet may constitute a finding of malice, *no case exists to establish malice where the deceased initiated the fight and where the defendant made no statements before, during or after the incident to corroborate intent.*

Williams is a malicious wounding case where the appellant argued that the evidence was insufficient to establish malice and an intent to maim. Robert Lee Williams had lived with Judy Lovewine for approximately two years. After they had separated Ms. Lovewine rented her own apartment. On November 27, 1989, at sometime between 3:00 and 4:00 a.m., Williams showed up at her apartment and rang the doorbell. After getting no response, he went

around and knocked on the back door. When she answered neither door, Williams left, but returned shortly thereafter and again began knocking on the doors. At 6:00 a.m., he broke the glass in the back door and entered her apartment. Ms. Lovewine fled and Williams went to her bedroom and found Alton Biggs who was dressing for work. "Each man directed the other to leave. The appellant then attacked Biggs, striking him four or five times with his fists. Biggs neither threatened nor struck the appellant and had no weapon. The appellant continued striking Biggs until the police arrived." Williams at 394-395. Biggs was severely beaten and required extensive medical treatment for his jaw and eye.

In Williams *the defendant was clearly the first aggressor,* who as the Court noted, "came to Ms. Lovewine's home bent on trouble." Williams at 398. In addition to his unprovoked attack, Williams also provided a statement, via a note to Ms. Lovewine which corroborated and established his intent. The note, which was written two days before the incident, stated: '"Hey Judy, your ass and that negro ass can run but you can't hide. Robert."' Williams at 395. Williams admitted that he had seen Ms. Lovewine with Biggs the day before he wrote the note. Id.

In its ruling upholding the finding of malice with an intent to maim, the Court in Williams cited four other cases which provide factual circumstances to allow for the finding of malice when only fists and/or feet are employed. In each of the four cases (which also are wounding cases), *the defendants were the first aggressors and each had made statements to corroborate and establish their intentions*:

In Shackelford v. Commonwealth, 183 Va. 423 (1945), the defendant provoked an argument with his estranged wife, Fannie Lee Shackelford at the home where she was staying. When it appeared that Ms. Shackelford had been

injured, the defendant's sister-in-law, the victim, intervened by stating, "leave, leave now." Id. at 425. The defendant said, "this is the third time that you have messed in my business and this time I will finish you." Id. He then struck the victim with his fists on her nose, in her eye and on her ear from which she suffered severe and permanent injury. Further injury was prevented by Ms. Shackelford grabbing the defendant. Id.

In Bryant v. Commonwealth, 189 Va. 310 (1949), the defendants, two young men, called the 76 year old victim out of his home at night by false pretense and threatened to kill him by stating, *inter alia*, ". . . you will never bother anybody else anymore after we get done with you tonight." Bryant at 318. They then "beat him with their fists until blood ran from his ears, nose and mouth. His ear and his lips were swollen and bruised." Williams at 397.

In Fletcher v. Commonwealth, 209 Va. 636 (1969), the defendant and his three companions showed up at a party to which they were not invited. When they were denied admittance to the home, they returned to the defendant's residence, retrieved a sawed-off shotgun and returned to the party later that evening. At approximately 11:30 p.m. two invitees left the party and entered a parked car. Evan Thompson, the first victim, fell asleep in the back seat of the car and the other gentleman was in the front. Shortly thereafter, the defendant and his companions showed up and the first thing Thompson remembered was being hit in the face by the defendant. Blood ran out of his eyes, ears and mouth and he suffered cuts on his face bruises under his right eye and a hemorrhage, depression of the left eye and a blow out fracture of the orbital floor. Id. At 638.

William Baron, the second victim, left the party shortly after Thompson and was proceeding to Thompson's car when he was accosted by one of the defendant's

companions with the sawed-off shotgun. While the gun was pointed at Baron, the defendant struck him knocking him to the ground. After knocking him to the ground three or four times, the defendant kicked the victim four or five times in his side, shoulder and head, "as hard as he could." Id. During the attack, the victim remarked that he was going to Viet Nam. In response, the defendant was heard to say, '"You are a * * * , you are going in a pine box."' Id. at 639.

In Dawkins v. Commonwealth, 186 Va. 55 (1947), (the case the Commonwealth cited in its Brief in Opposition, to the Court of Appeals, on page eight) the victim, Robert Rogers, "did nothing more than enter a line of traffic in front of a car driven by the defendant [D. J. Dawkins]." Id. at 62. After proceeding in traffic, Rogers approached the first intersection when the defendant's car "bumped into him 'from the rear, very hard.'" Id. at 58. Approximately fifty feet farther down the street, Roger's car received '"another hard bump from the rear.'" Id. Although "there was sufficient space for any car in the rear to pass the car of Rogers," the defendant bumped into Roger's car two additional times before Rogers pulled over to determine the reason for these actions. After Rogers had stopped, "the defendant's car gained momentum and hit him again, '"a definitely hard blow, harder than any of the others."' Id.

Rogers got out of his car and went back to the car of Dawkins and asked, "[w]hat is the meaning of this damn foolishness?" Id. Dawkins immediately struck at Rogers though the open window and exclaimed, '"so I'm a God dammed fool? Let me out of the car. I'll teach you to cut in on me." Id. at 59. Rogers at 45 years of age, weighing 155 pound and being "more or less of an invalid since 1944, when he had undergone a serious operation on his bladder," tried to keep the door closed to prevent the defendant from exiting the car. Id. Dawkins, weighing 220

pounds and being a professional wrestler, was able to force the door open. After he got out, Dawkins "immediately assaulted Rogers, hitting him in and about the face with his fists, kicking him on the legs, and striking him at least twice in the groin with the knee." Id. After the affray, when the police were present, Dawkins also stated to Rogers: '"I will twist your nose on the other side of your face,"' and '"I'll kick the hell out of you,"' "in addition to other vulgar expressions." Id.

Rogers was "beaten to a pulp," and he suffered "multiple fractures of the nose, including a breaking of its inner membrane, a permanent displacement of the nose, and an almost complete obstruction of the right naris, and also severe bruising . . . of the genital organs." Id.

The Court noted: "The statements of the accused both before the altercation, during the altercation and thereafter afford evidence of malice. Those statements, accompanied by the violence and brutality of the attack, were sufficient to carry the question of malice to the jury." Id.

The above-mentioned (fists and feet) cases were the cases relied upon to deny Goldsberry's Petition for Appeal. In each case *the defendants*, not the victims, initiated and provoked the disturbances. *In each case, statements made by the defendants accompanied their actions to establish evidence of malice.* In Goldsberry's case the deceased was the undisputed first aggressor and Goldsberry made no statements to infer a malicious intent.

After misstating material trial testimony and a constitutional burden of proof, the Virginia appellate courts misapplied Virginia law and disregarded its precedent.

D. Relevant law disregarded by the Virginia appellate courts.

The arbitrary acceptance of the prosecutor's misstatements of material testimony and the erroneous statement of a constitutional burden of proof led the Virginia appellate courts to ignore applicable law which would have supported Goldsberry's Petition for Appeal. If the State appellate courts would have reviewed the petition allowing the objective record to dictate which law to apply, the petition would have been accepted on the merits of the case.

Specifically, rather than intimating that Goldsberry gave *self-serving* testimony, the courts were under a duty to look at the comprehensive record (which was thoroughly cited in the petitions), to determine whether Goldsberry's testimony was inconsistent with the Commonwealth's evidence.

Because Goldsberry's testimony that Ballard assaulted him outside of the club, is not only consistent with the totality of the evidence, but actually flows from the evidence, certain Virginia case law should have been applied in the review of his petition.

In the 19th Century case of Bull v. Commonwealth, 55 Va. (14 Gratt.) 613, 616 (1857), the court upheld a jury instruction on the law of manslaughter in murder case that arose from mutual combat, which remains in force to this day. The court held that if "no weapon dangerous in itself was used, but only the fists and feet, yet if the jury are satisfied from the evidence that the manner of inflicting the blows was *cruel and unusual, and exceeded in number and violence what was necessary to repel the deceased,* and the deceased died of such beating, then the prisoner is guilty of voluntary manslaughter." (Id.) (emphasis added).

For the above principle of law to apply to Goldsberry's appeal, the evidence must support the assertion that either the deceased started the fight or the fight began out of mutual combat.

In Goldsberry's case it is beyond dispute that Ballard started the fight. Inside the establishment the deceased aggressively confronted Goldsberry with abusive and insulting language. Although he had been ordered to leave out of a separate exit, the deceased was found waiting at Goldsberry's point of exit, outside of the club. The deceased came straight at Goldsberry with fighting words and assaulted him by lunging forward with his hands. (Tr. II, p. 298). Goldsberry blocked his hands and Villalpando stepped in. (Tr. II, pp. 274-75). As witnessed by Williams, the deceased then assaulted Villalpando. (Tr. I, p. 70).

The Commonwealth offered no evidence to show that the deceased did not assault Goldsberry. Not one Commonwealth witness could say he saw the initial happenings between the deceased and Goldsberry outside of the club. The first observation by Williams, who admittedly lost sight of the deceased, was Ballard "right up close" to Goldsberry and Villalpando, with the deceased pushing and swinging at Villalpando. (Tr. I, p. 70).

Additional well-settled Virginia law ignored by the Virginia appellate courts was the maxim that *an unlawful assault always constitutes more than slight provocation* and if the accused becomes "greatly excited" and reacts, even with a deadly weapon, and kills the aggressor, he is guilty of manslaughter, not murder. See Moxley v. Commonwealth, 195 Va. 151 (1953); Briggs v. The Commonwealth, 82 Va. 554 (1886).

Of course, Goldsberry used no weapon, much less a *deadly weapon*.

Moreover, when fists and feet are used exclusively, only "slight provocation" in the form of "words only" will reduce murder to manslaughter. Such was the case with Roark v. Commonwealth, 182 Va. 244 (1944). Akers Roark was tried for murder and was found guilty of involuntary manslaughter. On appeal the case was reversed because the evidence did not support the giving of instructions for malice. In Roark, there was no antecedent grudge and the provocation merely consisted of an argument, with the deceased saying: '"you're a lying son-of-a-bitch."' Id. at 246.

Under the present facts, to have properly denied Goldsberry's Petition for Appeal under a merit-based review when only fists and feet were used, the Virginia appellate courts must have found from the record that Goldsberry acted "without any" provocation from Ballard. This finding is unreasonable, erroneous, and contrary to the evidence. The evidence established that Ballard, as the first aggressor, not only used insulting words, but also assaulted both Goldsberry and Villalpando.

CONCLUSION

Based upon the foregoing, it is hereby respectfully requested that this Honorable Court grant the foregoing Writ of Certiorari allowing Goldsberry to argue that his case be remanded and the Virginia Supreme Court be ordered to review the petition according to the merits of the case; in a manner consistent with application of accurate trial testimony, the correct burden of proof in a murder case and the applicable law.

Respectfully submitted,
Baron S. Goldsberry

By: /s/Monte E. Kuligowski
Counsel

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Counsel of Record
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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of January, 2004.

Baron Spencer Goldsberry, Appellant,

against Record No. 031084
Court of Appeals No. 1765-02-1

Commonwealth of Virginia, Appellee.

[ENTERED: JANUARY 30, 2004]

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 17th day of November, 2003 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/_____
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 17th day of November, 2003.

Baron Spencer Goldsberry, Appellant,

against Record No. 031084
Court of Appeals No. 1765-02-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

[ENTERED: NOVEMBER 17, 2003]

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia H. Krueger, Clerk

By: /s/ Sharon L. Kelly
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday the 11th day of April, 2003.

Baron S. Goldsberry, s/k/a
Baron Spencer Goldsberry, Appellant,

against Record No 1765-02-1
Circuit Court No. CR00004031-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Norfolk

Before Judge Kelsey, Senior Judges Hodges and Bray

[ENTERED: APRIL 11, 2003]

For the reasons previously stated in the order entered by this Court on January 23, 2003, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/Marly V. P. Ring
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 23rd day of January, 2003.

Baron S. Goldsberry, s/k/a
Baron Spencer Goldsberry, Appellant,

against Record No. 1765-02-1
Circuit Court No. CR00004031-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Norfolk

Before Judge Walter S. Felton, Jr.

[ENTERED: JANUARY 23, 2003]

This petition for appeal has been reviewed pursuant to Code § 17.1-407(C) and is denied for the following reasons:

I. A jury convicted appellant of second degree murder. On appeal, he contends the evidence was insufficient to support the verdict. Appellant argues the evidence proved he acted in the heat of passion rather than with malice. Appellant also argues he did not possess any weapon where malice could be inferred.

"On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.'" Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997) (citation omitted).

So viewed, the evidence proved there was a confrontation between Timothy Ballard, the victim, and appellant at a bar, and continued outside in the parking lot. Gregory Williams, Ballard's friend, and Francisco Villalpando, appellant's friend were present in the parking lot. Williams testified appellant repeatedly kicked Ballard while Ballard was on the ground. At some point Williams joined in the fight. Other witnesses testified they saw two men kicking and punching Ballard in the head and chest area and that Ballard never fought back once he was on the ground. The medical examiner testified Ballard died from severe blunt force trauma to the head and sustained numerous lacerations, bone fractures, bruising of the brain tissue and injury to the brain stem. Ballard's blood alcohol level at the time of the autopsy was .15% by weight, and the medical examiner testified a person with this level of alcohol could be aggressive.

Appellant testified Ballard approached him inside the bar and initiated a verbal confrontation. Appellant testified he was ordered to leave the bar and when he went outside, Ballard approached and attacked him. Appellant testified he was backing away when Vallalpando joined the fight and Ballard swung at Villalpando. Appellant testified he only kicked Ballard twice and did not intend to kill him. Appellant and Villalpando ran from the scene. There was no evidence that appellant possessed a weapon.

"The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995). "In its role of judging witness credibility, the fact finder is entitled to disbelieve the self-serving testimony of the accused and to conclude that the accused is lying to conceal his guilt." Marable v.

Commonwealth, 27 Va. App. 505, 509-10, 500 S.E.2d 233, 235 (1998).

"Whether or not an accused acted with malice is generally a question of fact and may be proved by circumstantial evidence." Canipe v. Commonwealth, 25 Va. App. 629, 642, 491 S.E.2d 747, 753 (1997). "'Under ordinary circumstances no malice may be inferred from such a blow [with a bare fist] even though death results. However, an assault with the bare first may be attended with such circumstances of violence and brutality that an intent to kill will be presumed.'" Williams v. Commonwealth, 13 Va. App. 393, 395, 412 S.E.2d 202, 203 (1991) (citation omitted).

The jury was instructed on first degree murder, second degree murder, voluntary manslaughter, self-defense and defense of others. The jury was also instructed on the meaning of malice, sudden heat of passion upon reasonable provocation and the use of reasonable force for protection. The jury heard the testimony of the witnesses and observed their demeanor. At the conclusion of the evidence the jury necessarily rejected appellant's testimony that he acted in a sudden heat of passion and without malice. The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of second degree murder.

II. Appellant contends the trial court erred in refusing to admit into evidence a photograph of Ballard that depicted his full size. He argues the photograph was exculpatory because it showed Ballard's size in relation to his size.

The Commonwealth introduced into evidence photographs of Ballard, but none of the photographs depicted the full size of Ballard. There was one photograph

that depicted Ballard's full size, but it showed him secured with straps to a stretcher in the back of an ambulance. The Commonwealth's attorney showed it to defense counsel prior to trial; however, the Commonwealth did not request to admit this photograph. Appellant requested that the photograph be admitted. He argued the photograph was exculpatory because it corroborated his testimony that he feared Ballard due to Ballard's large size. The trial court found that the Commonwealth was not required to produce the photograph and there was sufficient testimony concerning the size difference between appellant and Ballard.[1]

> The Commonwealth is required to provide a defendant exculpatory evidence, including evidence which impeaches the credibility of a prosecution witness. However, a defendant does not have a general constitutional right to discovery in a criminal case.
>
> In order for a defendant to establish a Brady violation, he must demonstrate that the undisclosed evidence was exculpatory and material either to the issue of guilt or to the issue of punishment. The mere possibility that "undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

Goins v. Commonwealth, 251 Va. 442, 456, 470 S.E.2d 114, 124 (1996) (citations omitted).

---

[1] According to the trial transcript, the photograph was made part of the record. However, it was not included in the record on appeal.

> The admission into evidence of photographs of the body of a murder victim is left to the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion. A graphic photograph is admissible so long as it is relevant and accurately portrays the scene of the crime.

Hanson v. Commonwealth, 14 Va. App. 173, 182, 416 S.E.2d 14, 19 (1992).

The photograph showed Ballard strapped to a stretcher in the back of an ambulance. Witnesses testified as to the height and weight of both appellant and Ballard. Appellant sought to introduce the photograph to corroborate his fear of Ballard due to Ballard's size. However, the photograph did not accurately portray the difference in size between Ballard and appellant at the time of the fight, but it showed Ballard in the ambulance after the fight. The trial court did not err in finding that the Commonwealth was not required to produce the photograph, and denying appellant's request to admit the photograph into evidence.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407 (D) and Rule 5A:15 (a). If appellant files a demand for consideration by a three-judge panel, the demand should include a statement, not to exceed one typewritten page, identifying how this order is in error.

The Commonwealth shall recover of the appellant the costs in the trial court.

The Court's records reflect that Monte E. Kuligowski, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/Marly V. P. Ring
Deputy Clerk

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

FEDERAL INFORMATION PROCESSING STANDARDS CODE: 710

Hearing Date: **May 24, 2002** Court Reporter: **- J. Bottorff**
Judge: **John C. Morrison, Jr.** Court Clerk: **- WHD/tar**

COMMONWEALTH OF VIRGINIA

V.

BARON S. GOLDSBERRY, DEFENDANT

[ENTERED: MAY 30, 2002]

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, **Monte Kuligowski.** The Commonwealth was represented by **John R. Doyle, III,** or his designee.

On November 1, 2001, the defendant was found guilty by jury of the following offense(s):

CASE NUMBER **CR00004031-00**

OFFENSE DESCRIPTION AND INDICATOR (F/M)
2nd DEGREE MURDER F
(A LESSER INCLUDED FELONY)

OFFENSE DATE **7/9/00**

VA. CODE SECTION **18.2-32**

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code Section 19.2-299.

Pursuant to the provisions of Code Section 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departures from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court upholds the jury recommendation and **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: **20 years** for **Indictment #1.** The total sentence imposed is **20 years.**

This sentence shall run **consecutively** with all other sentences.

Costs. The defendant shall pay court costs of **$1,408.00 by May 24, 2002**, and judgment be entered therein.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code Section 53.1-187.

05/30/2002 ENTER:_____
DATE JOHN C. MORRISON, JR., JUDGE

DEFENDANT INDENTIFICATION:
BARON S. GOLDSBERRY, DEFENDANT
SSN: **238-31-4768** DOB: **12/7/75** Sex: **MALE**

SENTENCING SUMMARY:
TOTAL SENTENCE IMPOSED: **20 YEARS**
TOTAL SENTENCE SUSPENDED: **NONE**

* * *

[FILED: DECEMBER 1, 2003]

Additionally, the Commonwealth inaccurately asserts the following in its mentioned brief on page eight: "Clearly, the defendant's attach upon the head of a motionless, unconscious man was...a reasonable basis upon which the jury was entitled to find that he acted with malice." The record, however, does not support the assertion that Goldsberry attacked Ballard's head.

VI. THE COURT OF APPEALS ERRED IN MISSTATING A BURDEN OF PROOF AND GOLDSBERRY'S POSITION; AND IN ADOPTING THE COMMONWEALTH'S VERSION OF CERTAIN TESTIMONY WHICH IS UNSUPPORTED BY THE EVIDENCE.

In denying Goldsberry's Petition for Appeal, the Court of Appeals of Virginia misstated Goldsberry's position and a burden of proof for a murder conviction. On page one of its Order of January 23, 3003, the Court states: "Appellant argues the evidence proved he acted in the heat of passion rather than with malice." In its Order of April 11, 2003, the panel simply denied the Petition for the "reasons previously stated in the order entered by this Court on January 23, 2003...."

Goldsberry certainly does not argue that the evidence "proved he acted in the heat of passion rather than with malice." See Mullaney v. Wilbur, 421 U.S. 684, 704 (1975). Goldsberry, of course, does not bear the heavy burden to "prove" he acted in the heat of passion. As stated above, the burden to prove malice and to prove the absence of passion beyond a reasonable doubt rests squarely with the Commonwealth and, as a "procedural device," the defendant is only required to offer some evidence or rely on

the Commonwealth's evidence to negate the presumption of murder. Hodge v. Commonwealth, 217 Va. 338, 343 (1976).

* * *

* * *

Q. When you saw him, how close was he to those two?
A. Real close, right up next to them.
Q. Was he right next to both of them or was one closer than the other or do you remember?
A. He was closer to Villalpando.
Q. What was going on? What did you see?
A. There was, like, a little, short argument, and then there was a push and a swing.
Q. Who pushed whom, and who swung at whom?
A. Tim pushed and swung, and then he was on the ground?
Q. Did you see Tim hit anybody?
A. No.
Q. When you say, "Tim pushed and swung and then was on the ground," how quickly did that happen?
A. Within a second.
Q. How long did you see him standing?
A. Couple seconds.
Q. When you say, "He was on the ground," did you see how he got to the ground?
A. Lost his balance, I guess.

MR. ROBINSON: Judge I'm going to object

THE WITNESS: He lost his balance.

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A. He was on his back.
Q. Could you tell - - when you say, "kicks," what kind of kicks do you mean? Was it a forward kick? A backward kick?
A. It was a soccer kick.
Q. That would be kicking forward with the knee bending?
A. Yes.
Q. How many kicks did you see, approximately?
A. I don't know, just a few until - - you know, there were people in front of me and stuff. Just a few kicks, I mean, approximately, maybe four or five a piece or something to that effect.
Q. What did you do?
A. What's that?
Q. What did you do?
A. I went over to him and said, What the hell is going on? It's two people on one. What is going on? And Goldsberry came over to me and hit me in the right cheek. After that, both of them ran.
Q. Hit you in the right cheek with what?
A. With his fist.
Q. After he hit you in the right cheek, did you stumble backwards, did you fall, what happened?

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this argument?

A. After Tim fell, they were both kicking him.

Q. Before this, everyone was standing upright. What was Mr. Goldsberry doing at that time?

A. I don't know..

Q. How far away from Mr. Ballard and Mr. Villalpando was Mr. Goldsberry standing?

A. Within a few feet.

Q. But it was clear to you that he was not directly a part of whatever was going on between Mr. Villalpando and Mr. Ballard, was he?

A. At that time?

Q. At that moment?

A. At that moment, right.

Q. Help me understand. You're watching all of this from a stationary position on the deck. You're just standing there watching?

A. I wasn't just standing there watching.

Q. Well, what were you doing?

A. Well, as soon as something got started, a bunch of people jumped down that way. When I got down there, they were kicking him. Then as soon as I went down there to try to break it up, he came over there and hit me. As soon as he hit me, I explained to him that I

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Q. From what you describe then from the point at which you say Ballard lost his balance and was being kicked by Mr. Goldsberry and Mr. Villaipando, that lasted a few seconds?
A. Approximately a few seconds.
Q. Then you started moving toward them?
A. Yes.
Q. You said Mr. Goldsberry punched you in the cheek?
A. Yes.
Q. Did anybody take a picture of that? Did you tell the police about that?
A. No?
Q. Did the police come out there that night?
A. Yeah. They were out there. It was stated in the report that Goldsberry swung at me.
Q. I'm not talking about what some report says, I'm asking you.

MS. CAPOTOSTO: Your Honor, that - -
THE WITNESS: Yes. I said the report said he swung at me.

By MR. ROBINSON:

Q. Did you tell the police that he hit you?

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Q. You heard sound?
A. Sound.
Q. What did you do?
A. I looked over and saw people fighting.
Q. What do you mean by that? What did you see?
A. I saw one guy lying on the ground and two others guys attacking.
Q. How were they attacking?
A. One was kicking him, the other was punching him.
Q. Were they both standing, or were they in different - -
A. One was standing and one was squatting down..
Q. What was the one squatting down doing?
A. Punching him.
Q. What was the guy standing up doing?
A. Kicking him.
Q. Did you see where he was kicking the person on the ground?
A. Either in the shoulder or in the head.
Q. How many kicks did you see?
A. I saw two.
Q. How long did you look at it?

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A. No.
Q. Pole, bat, stick, anything like that?
A. No.
Q. Did you get close enough to see what kind of shoes these people had on or not?
A. No, I don't. I took off down the beach.
Q. When you were in the bar in the poolroom and heard this argument, did the person - - strike that. Did you recognize the man on the ground as one of the people that was involved in the argument in the poolroom?
A. No I didn't. Like I said, I didn't pay attention..
Q. You didn't correlate either event?
A. I didn't pay attention to who was arguing.
Q. Okay. From the bit that you were able to see, would you say this thing lasted a couple of seconds?
A. More or less from what I saw.

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A. Yes.
Q. You looked over, and what was the next thing that you saw amongst those three people?
A. One guy grabbing one guy down low by the feet area, the other guy had him up on top of him.
Q. What were each of the people doing that were tackling the guy on the ground, if you could tell us?
A. Kicking and punching, stomping. It happened so quick.
Q. How many kicks do you remember seeing, and were did they land on the person on the ground, if you remember?
A. I couldn't tell you the total amount of kicks. One guy was definitely more aggressive than the other. There were kicks.
Q. Where on that person's body?
A. Face, head, ribs, back.
Q. What was the other individual doing while that person was kicking?
A. Which individual?
Q. In other words, there were two people tackling one person. You described one kicking to the head and back and ribs area. What was the other person doing?

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Q. What did you do?
A. I ran over to the scene and I pulled - - by that time, there was only one man on him. I got him off. Then I didn't know how bad it was, or I wouldn't have let the guy go, and he ran down the beach.
Q. So you didn't keep possession of anybody?
A. No.
Q. All right. And you're saying one left a little before the other?
A. I believe so, yes.
Q. Do you know which person you got a hold of?
A. The one that was the taller guy, the main aggressor. By that time, the one man was already off, who had started the fight with his friend, the verbal fight.
Q. Let's go back for a minute. Tell the jury what you saw in relation to - - you said, "the man's friend," which man's friend?
A. The deceased's friend.
Q. What made you think he was his friend?
A. Because they were out there together.
Q. Okay. What action or physical contact or words or anything did you see between the man's friend and the two that were doing the kicking?
A. I believe his friend got hit once, and they were kind of maybe 10 to 12 feet away from where the other guy was still kicking him. They were verbally going at it. I think there might have been a punch thrown.
Q. Did you ever see his friend get physically involved in the -
A. No, not physically, no.
Q. I'm sorry. Let me finish. Physically involved in what was going on and around with his friend?
A. No.
Q. All right. And you say when you first looked over, you saw three people not four; correct?

A. Two attacking one, yes.
Q. You didn't see the fourth guy, the friend, at that point; correct?
A. No.
Q. What Happened after the two ran down the beach?
A. Everybody started pilling around the area. It got confusing. Then we realized how serious the guy was. We kind of looked for the two that had done it. They had gone down the beach.
Q. And did the police eventually come?

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A. As soon as I heard it, I turned to look. In a matter of seconds after that, I was on my way to the scene. It didn't look right at all.

Q. All right. You looked within seconds and immediately got up?

A. I looked instantly.

Q. At least you got up to get a closer look?

A. I went to stop two guys from being on one.

Q. Okay. Did you ever see - - I think you indicated that one of them approached a person who appeared to be the friend of Tim Ballard's?

A. Yeah?

Q. When that happened, the other man was still beating Mr. Ballard?

A. Yes.

Q. He was the, I think you used the term, primary or main aggressor, something like that?

A. Yes.

Q. Initially?

A. Yeah.

Q. And he's the one that got away from you

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A. Everybody was starting to go that direction. I happened to be the closest to it so I was in front, but there was a couple of people right behind me in my area. In a matter of a second, everybody was going that way. People were coming, all the people in the parking lot were coming up, too.

Q. The man who was confronting the friend, could you describe what you saw?

A. He got away from the main fight first, and then he was threatening the friend. They were backing up into the car area.

Q. Could you hear what was being said?

A. Not reallly.

Q. All right. Could you see what was being done?

A. Well, when he was backing up, I believe he threw a punch at him.

Q. Threw a punch?

A. Yea. I didn't see more than one.

Q. You said he was threatening, could you hear what was being said?

A. No.

Q. All right. And so you don't know - - when you say, "threatened" - -?

A. He was coming at him. He was coming out

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BY MR. ROBISON:

Q. From the time that you heard the scuffle until the time that you arrived at Mr. Ballard's side, would you say 30 seconds might have elapsed?
A. Less than 30 seconds.
Q. Less than 30 seconds. Would you be correct then in the assumption that all of this happened very quickly?
A. Yes.

MR. ROBINSON: All right. That's all the questions I have for the witness.
THE COURT: Do you have any redirect?
MS. CAPOTOSTO: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. CAPOTOSTO:

Q. You said that within seconds from seeing and hearing what you saw, you were off the deck and down there. You said it didn't look right at all. What do you mean?
A. Well, there was two men pummeling one. He was on the ground not defending himself. The reason why or where they cam from wasn't an issue at the time. I just wanted to stop what was happening as soon as I

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A. At least eight.
Q. From the same individual or from both of them or do you remember?
A. Eight from the one person that was standing, and I only saw the one that the last person kicked him after he got up off of him.
Q. Where did that kick land? Could you see?
A. In his head.
Q. Was anything blocking your line of sight from where you were on the deck to where this was happening?
A. No.
Q. Did anybody get in your way during this time?
A. No.
Q. Did you stand up?
A. Not until - - it went on for about ten minutes. I stood up and yelled for somebody to stop it because at first, it was just like somebody arguing. Then it was, like a fight. But, you know, I work at the bar so it's not like this is the first time there's been a fight or something. So it was no big deal until I noticed, you now, that the guy had just been lying there and never even really moved. It didn't look like

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Q. Do you recall specifically what he said?
A. He said, That was a bullshit shot.
Q. Bullshit shot. Didn't say it was a foul shot, he said it was a bullshit shot?
A. Yes, sir.
Q. How did he say it? Was it cordial, friendly, soft or what?
A. He just said, bullshit shot, you know.
Q. Did you respond to him? Did you say something back to him?
A. I tried to explain what shot I was actually trying to make, you know.
Q. Did he say something else?
A. He disagreed with me.
Q. What happened?

A. He continue to say it was a bullshit shot, and it evolved into other curse words and confrontation back and forth.
Q. Did you get angry?
A. No, I didn't get angry.
Q. Can you describe his demeanor, how he acted towards you?
A. He seemed to get angrier as I tried to explain myself more to him and cursed more, and it turned less into an argument about pool but into more into

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